

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,
Plaintiff,

NO. CR. S-93-086 WBS

v.

ORDER RE: MOTION FOR
MODIFICATION OF AN IMPOSED
TERM OF IMPRISONMENT

VERNON L. WATTS,
Defendant.

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Defendant Vernon L. Watts' has moved for modification of an imposed term of imprisonment, pursuant to 18 U.S.C. § 3582(c)(2).

I. Factual and Procedural Background

On February 11, 1993, an indictment was filed charging defendant with possession with intent to distribute approximately 560 grams of cocaine base on January 26, 1993, in violation of 21 U.S.C. § 841(a)(1). On December 7, 1993, defendant was found guilty of the charge, and on May 11, 1994 he was sentenced to 262 months' imprisonment, pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq.; 28 U.S.C. §§ 997-998. On appeal,

1 the Ninth Circuit affirmed defendant's conviction, but vacated
2 the sentence and ordered the case remanded to this court for
3 resentencing. United States v. Watts, 67 F.3d 790, 796 (9th Cir.
4 1995). Before this court could resentence defendant pursuant to
5 the Ninth Circuit's order, the Supreme Court reversed the
6 decision of the Ninth Circuit. United States v. Watts, 519 U.S.
7 148, 149 (1997)).

8 On January 27, 1998, defendant filed a motion to vacate
9 or set aside his sentence pursuant to 28 U.S.C. § 2255. On
10 December 7, 1998, this court denied that motion; and on April 23,
11 1999, this court denied a certificate of appealability. On June
12 26, 2001, defendant filed another motion under 28 U.S.C. § 2255;
13 and on November 9, 2001, the Ninth Circuit denied defendant's
14 request to file a successive petition under § 2255. After
15 defendant voluntarily dismissed his pending section 2255 petition
16 on January 8, 2002, the instant motion ensued on February 17,
17 2006.

18 II. Discussion

19 The cocaine base seized from defendant initially
20 weighed 559 grams. However, a few weeks later, the cocaine base
21 weighed 550 grams, and at the time of trial, it weighed
22 approximately 440 grams. The government had previously presented
23 expert testimony establishing that it is common for cocaine to
24 lose moisture over time, which in turn causes a decrease in
25 weight. Defendant did not present any evidence to the contrary.
26 Watts, 67 F.3d at 796. Additionally, the defendant's statements
27 indicated that he had planned to sell the cocaine base in the
28 week that followed his arrest. Based on a finding that defendant

1 was in possession of more than 500 grams of cocaine base with the
2 intent to sell, this court ordered a sentence of 262 months with
3 60 months of supervised release. Watts, 67 F.3d at 796.

4 In this motion, defendant seeks modification of his
5 term of imprisonment under Amendments 484 and 591 of the United
6 States Sentencing Guidelines ("U.S.S.G."), contending that the
7 weight of cocaine base he was charged with possessing improperly
8 included the weight of water that had been added to the drug, as
9 evidenced by the decrease in weight over time. Defendant
10 additionally argues that the amount of the controlled substance
11 should have been determined by a jury, and not by the judge.

12 Because "a district court does not have inherent power
13 to resentence defendants at any time," the court must first
14 consider whether it has jurisdiction over this matter. See
15 United States v. Hock, 172 F.3d 676, 680 (9th Cir. 1999)
16 (quotation omitted). Defendant contends that this court has
17 authority to modify his sentence under 18 U.S.C. § 3582(c)(2).
18 Section 3582(c)(2) provides that:

19 The court may not modify a term of imprisonment
20 once it has been imposed except that . . . in
21 the case of a defendant who has been sentenced
22 to a term of imprisonment based on a sentencing
23 range that has subsequently been lowered by the
24 Sentencing Commission pursuant to 28 U.S.C. 994(o),
25 . . . the court may reduce the term of
imprisonment, after considering the factors set
forth in section 3553(a) to the extent that they
are applicable, if such a reduction is consistent
with applicable policy statements issued by the
Sentencing Commission.

26 In particular, defendant moves for modification of his sentence
27 based on Amendments 484 and 591 to U.S.S.G. § 2D1.1.

28 "Amendment 484 clarifies the definitions of 'mixture'

1 and 'substance' as they are used in the Guidelines by providing
2 that for the purposes of calculations of base offense levels,
3 they do not include those 'materials that must be separated from
4 the controlled substance before the controlled substance can be
5 used.'" United States v. Sprague, 135 F.3d 1301, 1305 (9th Cir.
6 1998). Thus, the weight of any unusable materials should not be
7 used to determine the appropriate sentence; for example, the
8 weight of containers or packing materials should be disregarded.
9 Id. However, "the weight of a consumable cutting or diluting
10 agent used to increase the total amount of a marketable
11 controlled substance would not be excluded as it need not be
12 separated to render the drug useable." Id.

13 Amendment 484 became effective on November 1, 1993.
14 Id. at 1303. Defendant was sentenced on December 7, 1993.
15 Therefore, Amendment 484 is not a modification to the guidelines
16 that occurred subsequent to defendant's sentence, and this court
17 does not have authority to grant defendant relief under 18 U.S.C.
18 § 3582(c)(2). See United States v. Nash, No. 92-5167, 2005 WL
19 2016919, at *2 (E.D. Cal. Mar. 31, 2005) (concluding that the
20 petitioner was "not entitled to a reduction of his sentence
21 pursuant to Amendment 484" because "Amendment 484 was adopted and
22 in effect at the time petitioner was sentenced, [and therefore]
23 Section 3582(c)(2) by its terms does not apply."). Although
24 defendant argues that the Ninth Circuit did not clarify the
25 application of Amendment 484 until the Sprague decision in 1998,
26 what is significant here is that he "requests relief not afforded
27 by the statute invoked." United States v. Herrera-Garcia, 422
28 F.3d 1202, 1203 (10th Cir. 2005).

1 Although defendant argues that Amendment 591 should be
2 applied to modify his sentence, the government correctly points
3 out that Amendment 591 to the Sentencing Guidelines is applicable
4 to enhanced penalties under § 2D1.2 for drug sales near protected
5 locations or involving vulnerable individuals, such as children
6 or pregnant women. See Nash, 2005 WL 2016919, at *4. Defendant
7 was convicted of possession with intent to sale, and not with the
8 sale of drugs near protected locations or involving protected
9 individuals; accordingly, this enhancement was not relevant to
10 the calculation of defendant's sentence and was not considered by
11 the court. Thus, Amendment 591 does not confer upon the court
12 the ability to modify defendant's sentence.

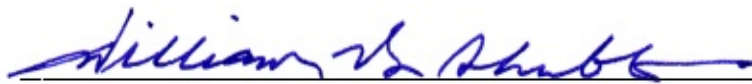
13 Defendant additionally argues that the jury should have
14 determined the amount of cocaine base. The United States Supreme
15 Court recently held in United States v. Booker, 543 U.S. 220, 244
16 (2005) that "[a]ny fact (other than a prior conviction) which is
17 necessary to support a sentence exceeding the maximum authorized
18 by the facts established by a plea of guilty or a jury verdict
19 must be admitted by the defendant or proved to a jury beyond a
20 reasonable doubt." However, the court also lacks jurisdiction to
21 re-sentence defendant under Booker. Not every defendant whose
22 sentence and appeal became final before Booker is entitled to the
23 benefits of its holding.¹ Because it "is a Supreme Court
24 decision, [and] not a retroactively applicable guideline
25 amendment by the Sentencing Commission[,] . . . Booker is
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27 ¹ Here, defendant's conviction and appeal also became
28 final before Booker's precursor, Apprendi v. New Jersey, 530 U.S.
466 (2000).

1 inapplicable to § 3582(c)(2) motions." United States v. Moreno,
2 421 F.3d 1217, 1220 (11th Cir. 2005).

3 IT IS THEREFORE ORDERED that defendant's motion to
4 correct his original sentence be, and the same hereby is, DENIED.

5 DATED: October 24, 2006

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8 WILLIAM B. SHUBB

9 UNITED STATES DISTRICT JUDGE
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